

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

BRAD CHINN,

Plaintiff,

NO. CV-09-0354-EFS

V.

THE CITY OF SPOKANE; MARY VERNER; JOE SHOGAN; NANCY MCCLAUGHLIN; MIKE ALLEN; AL FRENCH; STEVE CORKER; RICHARD RUSH,

**ORDER GRANTING DEFENDANTS'
MOTIONS TO DISMISS, ENTERING
JUDGMENT, AND CLOSING FILE**

Defendant.

Plaintiff Brad Chinn exercised judicial prudence prior to challenging a land use decision made by the City of Spokane ("the City"). Nonetheless, Mr. Chinn was denied the opportunity to become a Spokane municipal court judge because of his First Amendment protected activity. Unfortunately, this Court is unable to provide Mr. Chinn with relief because he did not have a protectible property interest in the municipal court judgeship and Defendants enjoy common law legislative immunity. This Order memorializes and supplements the Court's oral rulings from the April 21, 2010 hearing.¹

¹ Mr. Chinn was represented by Karen Lindholdt. The City and Defendant Mayor Mary Verner were represented by Milton Rowland; Defendant

1 **A. Background²**

2 On May 19, 2008, Mr. Chinn filed a land use petition challenging the
 3 Spokane City Planning Department's approval of a 150-foot-tall structure
 4 in a neighborhood with a 35-foot height zoning restriction. The
 5 respondents in the land use action were the City and the owner of the
 6 property, West Central Development, LLC, which is owned by Dr. Marcus
 7 DeWood and his wife.³

8 Because Mr. Chinn was a Spokane County District Court Commissioner,
 9 he contacted a Spokane District Court Judge, the City Prosecutor, the
 10 City's Acting Attorney, and Washington Judicial Conduct Commission Legal
 11

12 Richard Rush was represented by Laura McAloon; Defendants City Council
 13 President Joe Shogan and City Council Members Nancy McClaughlin, Mike
 14 Allen, Al French, and Steve Corker were represented by Mike Williams.

15 ² At the motion to dismiss stage, the Court accepts all material
 16 factual allegations in the Amended Complaint (Ct. Rec. [14](#)) and draws any
 17 reasonable inferences therefrom. See *Broam v. Bogan*, 320 F.3d 1023, 1028
 18 (9th Cir. 2003). Even though an amended complaint was filed, the Court
 19 considers the letter attached to the initial complaint (Ct. Rec. [2](#))
 20 because Defendants raised no objection to the consideration of this
 21 letter at the hearing. In addition, the Court takes judicial notice of
 22 the ordinances and City documents attached to the Defendants' response.
 23 (Ct. Rec. 16-1 & 16-2.)

24 ³ Dr. DeWood previously contributed to City Council Members Nancy
 25 McClaughlin's and Mike Allen's campaigns.

1 Counsel prior to filing the land use petition. These individuals advised
2 Mr. Chinn that they did not believe that the proposed land use petition
3 would conflict with Mr. Chinn's Court Commissioner responsibilities.

4 In 2008, rather than rely on Spokane County to prosecute municipal
5 misdemeanor and gross misdemeanor offenses, the City took steps to create
6 a municipal court system. On December 1, 2008, municipal ordinances,
7 which were to become effective on January 1, 2009, were enacted to
8 establish the municipal court system. Spokane Mun. Code §§ 05A.01.010 et
9 seq. Pursuant to Spokane Municipal Code § 05A.05.010.A, the mayor had
10 until January 31, 2009, to "appoint a municipal judge or judges subject
11 to confirmation by the city council." To facilitate this process, the
12 City advertised for three municipal court judgeships in December 2008.

13 On December 4, 2008, the City Attorney, who knew of Mr. Chinn's land
14 use petition, asked Mr. Chinn to apply for a municipal court judgeship.
15 On December 22, 2008, Mr. Chinn was advised by the City Human Resources
16 Director that he was selected as a municipal court judge. The following
17 day, Mr. Chinn received a letter from Mayor Verner appointing him for a
18 municipal court judgeship. This letter contained a form for Mr. Chinn to
19 return to indicate whether he desired to serve as a municipal court
20 judge.

21 Then, on December 24, 2008, Mayor Verner spoke with Council
22 President Shogan and other City Council Members. These individuals
23 advised Mayor Verner that Mr. Chinn had a conflict of interest due to his
24 land use petition and therefore they would not confirm his appointment.
25 Later that day, Mayor Verner called and left a message for Mr. Chinn,
26 advising that she did not have a majority of the City Council votes

1 needed to confirm him as a municipal court judge and, therefore, she was
2 withdrawing the appointment. Mayor Verner formally withdrew the
3 appointment on December 25, 2008. Thereafter, Mayor Verner appointed
4 Tracy Staab, Mary Logan, and Michelle Szambelan as Spokane Municipal
5 Court Judges, and the City Council confirmed these appointments on
6 January 2, 2009.

7 On December 26, 2008, City Council President Shogan told a Spokane
8 newspaper reporter that the City Council did not appoint Mr. Chinn
9 because of his land use petition. Because of Defendants' negative
10 portrayal of Mr. Chinn during this appointment process, Mr. Chinn was
11 unable to run in the municipal court election in November 2009 and he
12 suffered resulting economic losses, emotional distress, and public
13 humiliation.

14 Mr. Chinn filed this lawsuit on November 30, 2009, alleging that
15 Defendants violated his First Amendment right to petition the government.
16 Defendants seek dismissal of the lawsuit because 1) Mr. Chinn fails to
17 state a claim upon which relief can be granted and 2) the individual
18 Defendants are entitled to immunity.

19 **B. Standard**

20 A motion to dismiss under Federal Rule of Civil Procedure 12(b) (6)
21 tests the legal sufficiency of the pleadings. *Navarro v. Block*, 250 F.3d
22 729, 732 (9th Cir. 2001). A complaint may be dismissed for failure to
23 state a claim under Rule 12(b) (6) where the factual allegations do not
24 raise the right to relief above the speculative level. *Ashcroft v.*
25 *Iqbal*, 129 S. Ct. 1937 (2009); *Bell Atl. v. Twombly*, 550 U.S. 544, 555
26 (2007). Conversely, a complaint may not be dismissed for failure to

1 state a claim where the allegations plausibly show that the pleader is
 2 entitled to relief. *Twombly*, 550 U.S. at 555.

3 **C. Authority and Analysis**

4 The First Amendment states, "Congress shall make no law . . .
 5 abridging the freedom of speech, . . . or the right of the people
 6 peaceably to assemble, and to petition the government for a redress of
 7 grievances." Mr. Chinn seeks recovery for the damages caused by the
 8 alleged violation of his First Amendment right to petition the government
 9 for redress, pursuant to 42 U.S.C. § 1983. Section 1983 states:

10 Every person who, under color of any statute, ordinance,
 11 regulation, custom, or usage, of any State or Territory or the
 12 District of Columbia, subjects, or causes to be subjected, any
 13 citizen of the United States or other person within the
 14 jurisdiction thereof to the deprivation of any rights,
 15 privileges, or immunities secured by the Constitution and laws,
 16 shall be liable to the party injured in an action at law, suit
 17 in equity, or other proper proceeding for redress,

18 42 U.S.C. § 1983. A successful claimant must show a deprivation of a
 19 federal statutory or constitutional right by an individual acting under
 20 color of law. *Azer v. Connell*, 306 F.3d 930, 935 (9th Cir. 2002). In
 21 the confines of a § 1983 First Amendment wrongful retaliation claim, the
 22 claimant must show that 1) he engaged in protected speech, 2) the
 23 defendant took an adverse employment action against him, and 3) his
 24 speech was a substantial or motivating factor for the adverse employment
 25 action. See *Thomas v. City of Beaverton*, 379 F.3d 802, 808 (9th Cir.
 26 2004).

27 For purposes of this motion, Defendants do not challenge that Mr.
 28 Chinn engaged in constitutionally-protected speech when he challenged the
 29 City's decision to approve the building height variance. Defendants do
 30 challenge that 1) an adverse employment action was taken against Mr.

1 Chinn and 2) Mr. Chinn's speech was a substantial or motivating factor for
2 the adverse employment action. In addition, Defendants submit they are
3 entitled to absolute legislative immunity or, at a minimum, qualified
4 immunity.

5 1. Adverse Employment Action

6 _____ To claim an adverse employment action, an individual must have a
7 protectible property interest in the employment position. "Property
8 interests, of course, are not created by the Constitution. Rather, they
9 are created and their dimensions are defined by existing rules or
10 understandings that stem from an independent source such as state law."
11 *Allen v. City of Beverly Hills*, 911 F.2d 367, 369-79 (9th Cir. 1990). "A
12 government employee has a constitutionally protected property interest in
13 continued employment when the employee has a legitimate claim of
14 entitlement to the job." *Portman v. County of Santa Clara*, 995 F.2d 898,
15 904 (9th Cir. 1993) (citing *Bd. of Regents v. Roth*, 408 U.S. 564, 577
16 (1971)).

17 Mr. Chinn is not claiming a protected property interest in *continued*
18 employment, but rather he is claiming a protected property interest in a
19 new position - a municipal court judgeship. The terms of the municipal
20 court judgeship are governed by statute, not by contract. See *Weber v.*
21 *State Dep't of Corr.*, 78 Wn. App. 607 (1995) (holding that state
22 employment is defined by statute, not by contract). Under the terms of
23 the City ordinance, mere appointment by the mayor was insufficient to
24 create a legitimate claim of entitlement to a municipal court judgeship:
25 confirmation of the appointment by the City Council was required. Mayor
26 Verner's appointment was never confirmed by the City Council, and in fact
was withdrawn. Therefore, under the alleged facts, it is clear that Mr.

1 Chinn has no legitimate claim of entitlement to a municipal court
2 judgeship: the claimed express or implied-in-fact contract between Mr.
3 Chinn and Mayor Verner is irrelevant. Mr. Chinn fails to state a
4 retaliation claim under § 1983 because he was not subject to an adverse
5 employment action.⁴ See *Kraus v. Ky. State Senate*, 782 S.W.2d 433, 438-39
6 (Ky. Sup. Ct. 1993) (finding that individual who was advised that he
7 would be appointed an administrative law judge subject to senate
8 approval, but then later rejected, did not have a vested right to an
9 administrative law judge position); *Hernando v. Hamamoto*, No. 07-00620-
10 DAE-BMK, 2008 WL 1912445 at 7 (D. Hawaii April 29, 2008) (unpublished
11 opinion) (ruling that the failure to extend an interview to the plaintiff
12 was an adverse employment action because the plaintiff was not an
13 employee; “[N]o authority supporting the proposition that there is a
14 requirement to interview a job applicant pursuant to the First
15 Amendment.”); *Angello v. CNMI Public School Sys.*, 166 F.3d 342, *2 (9th
16 Cir. 1998) (unpublished opinion) (“If expectation of employment is not
17 a property right, it is obvious that an applicant for a job has no
18 constitutionally protected property right to an interview for the
19 position.” (internal citation removed)). Therefore, Defendants’ motions
20

21 ⁴ Mr. Chinn also fails to allege sufficient facts establishing that
22 the filing of his petition was a substantial or motivating factor for the
23 “adverse employment action.” Mr. Chinn seeks leave to amend his
24 complaint to add such facts and to remove reference to “respondeat
25 superior.” The Court finds amendment is futile because Mr. Chinn did not
26 suffer an adverse employment action.

1 are granted because the complaint fails to state a § 1983 wrongful
 2 retaliation claim.

3 2. Absolute Legislative Immunity

4 Defendants also contend that they enjoy absolute legislative
 5 immunity. It is undisputed that local legislators enjoy absolute immunity
 6 from civil liability for their legislative activities: this principle is
 7 based on common law. *Bogan v. Scott-Harris*, 523 U.S. 44, 49 (1998). The
 8 parties dispute, however, whether Defendants were engaging in legislative
 9 activity. Notwithstanding the Ninth Circuit's "muddying" of the
 10 "legislative activity" test, the Court agrees that Defendants enjoy
 11 legislative immunity.

12 In *Bogan*, the Supreme Court stated, "[w]hether an act is legislative
 13 turns on the nature of the act," whether the actions "were integral steps
 14 in the legislative process," and whether it "reflected a discretionary,
 15 policy making decision." *Id.* at 54-55. The Supreme Court also
 16 emphasized that an act that is mandatory and thus ministerial is not a
 17 legislative act entitled to absolute immunity. *Id.* at 51-52. Under the
 18 facts before it, the Supreme Court determined that the city council acted
 19 legislatively when it passed a budget eliminating a department with a
 20 single employee because the "ordinance reflected a discretionary,
 21 policymaking decision implicating the budgetary priorities of the city
 22 and the services the city provides to its constituents." *Id.* at 55-56.⁵

23
 24 ⁵ The Supreme Court also determined that the mayor was entitled to
 25 absolute immunity because the "introduction of a budget and signing into
 26 law an ordinance also were formally legislative, even though he was an

1 Following *Bogan*, the Ninth Circuit decided *Bechard v. Rappold*, 287
 2 F.3d 827 (9th Cir. 2002). Without an explanation, the Ninth Circuit
 3 continued to use its pre-*Bogan* two-factor test to determine whether an
 4 act was legislative: 1) "whether the act involves ad hoc decisionmaking,
 5 or the formulation of policy," and 2) "whether the act applies to a few
 6 individuals, or to the public at large." *Id.* at 829. After applying
 7 this test, the Ninth Circuit also applied the *Bogan* test, summarizing the
 8 *Bogan* test as "whether the action for which immunity is sought is
 9 'formally legislative [in] character' and whether it bears 'all the
 10 hallmarks of traditional legislation.'" *Id.* (quoting *Bogan*, 423 U.S. at
 11 55). Under both tests, the Ninth Circuit determined that the county
 12 commissioners' termination of an employee, which was neither on the
 13 record nor discussed at a public meeting, was not legislative action and
 14 therefore denied absolute immunity. *Id.* at 831-32.

15 In 2003, the Ninth Circuit addressed legislative immunity again in
 16 *Kaahumanu v. County of Maui*, 315 F.3d 1215 (9th Cir. 2003). In
 17 *Kaahumanu*, the Ninth Circuit combined the two tests and determined that
 18 the analysis involved a nonexclusive four-factor test:

19 (1) whether the act involves ad hoc decisionmaking, or the
 20 formulation of policy, (2) whether the act applies to a few
 21 individuals, or to the public at large, (3) whether the act is
 22 formally legislative in character, and (4) whether it bears all
 23 the hallmarks of traditional legislation.

24
 25
 26 executive official . . . [because] officials outside the legislative
 branch are entitled to legislative immunity when they perform legislative
 functions; [the mayor's] actions were legislative because they were
 integral steps in the legislative process." *Id.* at 55.

1 *Id.* at 1220 (internal quotation marks and citations removed).

2 As this Court must abide by Ninth Circuit jurisprudence, and because
3 the Ninth Circuit test is consistent with the legislative-immunity
4 principles articulated in *Bogan*, the Court applies this nonexclusive
5 four-fact test.

6 1. *Ad hoc decisionmaking v. formulation of policy*

7 The City passed ordinances establishing a municipal court system.
8 Although the decision to establish the municipal court system involved
9 the formulation of policy, the decision to appoint and confirm a
10 particular individual as a municipal court judge is an ad hoc decision.
11 This factor weighs against a legislative act finding.

12 2. *Act applies to a few individuals or to the public at large*

13 Although the act of appointing and confirming a specific judge
14 involves a limited number of individuals, the Court finds this factor
15 favors a legislative act because the public at large is ultimately
16 impacted by the determination of who is confirmed as a judge. The Court
17 recognizes that “[e]very decision by a local legislature can be described
18 as one made in the best interests of the public,” and therefore simply
19 because a vote was ultimately held does not necessarily determine whether
20 an act applies to the public. *Trevino v. Gates*, 23 F.3d 1480, 1483 (9th
21 Cir. 1994). Nonetheless, the public is greatly impacted by whom serves
22 as the municipal court judge. Therefore, this factor weighs in favor of
23 finding a legislative act.

24 3. *Character of the act*

25 *Bogan* directs the Court to “strip” “all considerations of intent and
26 motive” when determining the character of an act. *Bogan*, 523 U.S. at 54.

1 After stripping away Defendants' claimed intent and motive, the Court
2 finds the character of the claimed acts, i.e., the appointment by Mayor
3 Verner, the advisement by City Council members that they would not
4 confirm Mr. Chinn's appointment, and Mayor Verner's withdrawal of the
5 appointment, was legislative. Under the ordinance, the Mayor's judicial
6 appointment began the legislative process of selecting a judge. The
7 interaction between the Mayor and the City Council regarding the
8 appointment was integral to the legislative process. Further, a City
9 Council member may engage in research and communication upon learning of
10 an appointee to determine whether to confirm the appointee. In summary,
11 this factor weighs in favor of a legislative act.

12 4. *Hallmarks of traditional legislation*

13 The critical conduct at issue — communications regarding appointment
14 and confirmation and then withdrawal of an appointment — bear the
15 hallmarks of traditional legislation. This factor weighs in favor of
16 finding a legislative act.

17 5. *Conclusion*

18 In summary, the Court finds Mayor Verner's withdrawal of the
19 appointment and the Council members' comments regarding their decision
20 not to confirm Mr. Chinn are legislative acts and, therefore, the Mayor
21 and the City Council members enjoy absolute legislative immunity. See
22 *Schlitz v. Virginia*, 854 F.2d 43, 46 (4th Cir. 1988) ("The decision of
23 the Assembly to elect a state judge involves a core legislative function.
24 It involves deliberative and communicative processes by legislators at
25 the committee level through a vote on the floor of both houses of the
26 Assembly."); *Holley v. City of Roanoke*, 162 F. Supp. 2d 1335, 1342 (M.D.

1 Ala. 2001) ("In the instant case, the act of voting on the reappointment
 2 of a Board of Education member was purely legislative. . . . [The mayor]
 3 shares in the [city councils'] immunity in this case because she was
 4 engaging in the legislative process by presiding over the meetings of the
 5 City Council."); *Farrington v. City of Richfield*, 488 N.W.2d 13, 16
 6 (Minn. Ct. App. 1992) ("Appointments to legislative positions are
 7 legislative acts In making the appointment, the city council
 8 acted on behalf of the electorate."). The application of this non-
 9 exhaustive four-part test results in a ruling favorable to Defendants and
 10 unfortunately does not lessen the blow to Mr. Chinn, who may have lost an
 11 opportunity to serve as a municipal court judge simply because of his
 12 exercise of a cherished fundamental right.⁶ The diligence and prudence
 13 that Mr. Chinn exercised by contacting appropriate officials prior to
 14 filing his land use petition evidenced the very qualities that the public
 15 seeks in a judge.

16 **C. Conclusion**

17 For the reasons given above, **IT IS HEREBY ORDERED:**

18 1. Defendants City of Spokane and Verner's Motion to Dismiss
 19 Pursuant to Fed. R. Civ. P. 12(b)(6) (**Ct. Rec. 15**) is **GRANTED**.

20 2. Defendants Shogan, McLaughlin, Allen, French, and Corker's
 21 Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6) (**Ct. Rec. 21**) is
 22 **GRANTED**.

23 3. Defendant Rush's Motion to Dismiss Pursuant to Fed. R. Civ. P.
 24 12(b)(6) and Motion to Join in Motions to Dismiss by Defendants City of

25 ⁶ Because Defendants enjoy absolute legislative immunity, the Court
 26 need not reach Defendants' qualified immunity arguments.

1 Spokane, Verner, Shogan, McClaughlin, Allen, French and Corker Pursuant
2 to Fed. R. Civ. P. 12(g) (**Ct. Rec. 24**) is **GRANTED**.

3 4. All dates and deadlines set forth in the Scheduling Order (**Ct.**
4 **Rec. 34**) are **STRICKEN**.

5 5. Judgment shall be entered in Defendants' favor **with prejudice**.

6. This file shall be **CLOSED**.

7 **IT IS SO ORDERED.** The District Court Executive is directed to enter
8 this Order and forward a copy to counsel.

9 **DATED** this 17th day of May 2010.

Q:\Civil\2009\0354.dismiss.wpd